Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

JAMES MADISON STONE,

Petitioner,

v.

AUTOLIV ASP, Inc., formerly known as
MORTON INTERNATIONAL, Inc.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BRAD C. SMITH
Counsel of Record
STEVENSON & SMITH, P.C.
Attorneys for Petitioner
2605 Washington Boulevard
Suite 300
Ogden, Utah 84401
(801) 394-4573

160648

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

75pp

QUESTION PRESENTED

Under the ADEA, when a Plaintiff establishes a prima facie case and presents other evidence of discriminatory intent from which a trier of fact could reasonably disbelieve the Defendant's legitimate non-discriminatory explanation, must a trial court deny summary judgment.

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Stone respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case in light of this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. __ (2000).

REPORTED DECISION

The opinion of the United States Court of Appeals for the Tenth Circuit (App. A) was reported as *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132 (10th Cir. 2000). The district court decision (App. B) was not reported.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on 11 April 1999. The Tenth Circuit entered an order denying as untimely and on the merits a petition for rehearing on 15 May 2000. This petition is filed as though no petition for rehearing had been filed. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case pertains to the evidentiary standards required on summary judgment in an action under the Age Discrimination and Employment Act, 29 U.S.C. §§ 621-634. The Age Discrimination in Employment Act provides in pertinent part as follows:

> It shall be unlawful for an employer
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a).

STATEMENT OF THE CASE

Statement of Facts:

Petitioner James Madison Stone was employed by Respondent Autoliv ASP, and its predecessor in interest, for eighteen years. *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1135 (10th Cir. 2000). He was fifty-two years old at the time of his termination in June 1995. *Id.* Stone had consistently received above-average to superior performance evaluations throughout his eighteen year career and he moved steadily up through the ranks. *Id.* at 1135 & 1139 n.3. By the fall of 1993, he was Manager of European Programs; from this position he was assigned to Manager of Strategic Planning for Respondent, reporting to the Vice-President of Finance, Charles H. Seebock. *Id.* He was terminated from this position in June 1995.

In February 1995, Respondent hired a new president, Mr. Fred Musone, to replace the retiring president.[1] *Id.* Musone initiated a reorganization in March 1995. As part of this reorganization, many of the central management functions of the division were realigned around business

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1. Musone was a group vice-president and corporate officer of Morton International, Inc., and president of the ASP division.

processes and delegated to a lower level, at individual factories or plants. *Id.* Two new positions — a Vice-President of Manufacturing Support and a Vice-President of Operations — were established and five new plant managers were created. *Id.* and 1139 n.3. Additionally, a Board of Governance, consisting of Musone and his vice-presidents, including Seebock, was established.

The remaining vice-presidents were to reorganize their departments as they saw fit, consistent with the new plant management focus. *Id.* This reorganization created some vacancies; there were also some positions which were simply eliminated. There were no divisional goals to eliminate a certain number or percentage of employees or to reduce expenditures by a certain amount. There was also no written plan of reorganization. Moreover, the reorganization details and what ultimately became a reduction in force were kept secret, although word of the reorganization naturally spread among those transferring to new positions. *Id.*

The process of redefining positions in the reorganized division and of filling those positions was left in the hands of the individual vice-presidents. The responsibility for relocating those employees who would be left without a position following the reorganization was also delegated to the vice-presidents. Respondent had in place a written management policy regarding the treatment of salaried employees in reductions in force. (*See* App. D) This policy established guidelines for salaried employees who were to be terminated as a result of a reduction in force, by requiring that such persons be considered for other open positions with the division, based upon qualifications, current performance, and seniority. The completed reorganization and reduction in force were not publicly announced until they became

effective on Monday, 5 June 1995. During April and May 1995, Stone asked Mr. Seebock about the future of his position. Each time Seebock told him that it had not been decided whether to retain the position, relocate it, or eliminate it. *Id.* Finally, during a meeting of the finance department on 16 May 1995, Stone heard Seebock remind his subordinates that they needed to provide their "lists" to him referring to lists of persons without positions. Prompted by this comment, Stone requested a meeting with Seebock to again inquire about his position. During this meeting Seebock again asserted that he did not know the future of Stone's position and that he still needed to discuss the matter with Musone. Based upon this comment, Stone assumed that Musone would be the decision-maker, although it was subsequently learned that it was Seebock's decision. Seebock then told Stone that "I guess it would be difficult to do anything else at your age."[2] Stone responded to this by pointing out that he had retrained for his present position from his position in program management, only eighteen months previously. After the meeting, Stone returned to his office and recorded his recollection of the meeting in his day planner.

Seebock misled Stone regarding the future of his job during the 16 May 1995 meeting. The day before the meeting, Seebock had prepared a "tentative list" of 25 individuals "without a slot" including Petitioner James Stone. *Id.*

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2. The Tenth Circuit's opinion offers two alternate versions of the comment based upon Petitioner's deposition testimony. *Stone*, 210 F.3d at 1135. However, immediately following his encounter with Seebock, Petitioner recorded his recollection of the meeting in his daily planner. He noted that Seebock's comment was that "he guessed that 'it would be difficult to do anything else at your age.'"

Seebock's handwritten memo is the sole piece of documentary evidence relating to the elimination of the strategic planning position and the termination of Stone. With respect to Stone, this list was both tentative and final. Seebock gave it to Tea, who testified that he would have done nothing more with it than put it in his desk drawer. Notwithstanding having handwritten the memo the day before, Seebock dissembled when directly asked by Stone about the future of the position, claiming that no decision had yet been made. *Id.*

Having been misled by Seebock to believe that Musone would make the decision regarding his position, Stone prepared a memorandum for Musone outlining the reasons his position should be retained under the new decentralized organization. He gave it to Seebock, relying on him to convey it to Musone. During a subsequent, chance encounter with Musone, he told Stone that he had not received the memo and asked for a copy. Musone did nothing with the memo because he was waiting to see how the reorganization would "play out" and that he had no "specific feeling" about Stone or his position. Moreover, Musone testified that the decision to retain or eliminate the strategic planning position would have been "absolutely" left to Seebock. App. E at 50a.

Seebock was the decision maker with respect to Stone's position. Although Seebock indicated to Stone that he needed to talk to Musone, Musone testified that he intentionally tried to avoid such discussions for fear of prejudicing the vice-presidents' decisions. App. E at 50a. Tea on the other hand, gave three separate versions of the decision-making process regarding Stone and the strategic planning position: (1) the decision was Seebock's; (2) it was a group decision with

himself, Seebock, and Vice-President of Manufacturing Support; and/or (3) he made the decision personally in April 1995. In fact, the only indication in the record that any decision was made at all is Seebock's memo and Seebock and Tea's termination of Stone.

On Friday, 2 June 1995, Stone was called into a meeting with Seebock and Tea. They told him that both his position and his employment would be terminated the following Monday, 5 June 1995. *Id.* Curiously, Tea and Seebock asked Stone if he had any alternatives in mind. This was an unanswerable question for Stone, since the details of the reorganization, other than the selection of plant managers, had been kept secret and was not announced until 5 June 1995. Since he did not have an understanding of which positions would be available, Stone replied, "No, not at this time." Following his termination, Stone sent a letter and resume to Tea requesting that he be considered for other employment. This action ensued.

Federal Jurisdiction in the District Court:

This action was commenced under the Age Discrimination and Employment Act, 29 U.S.C. §§ 621-634. Accordingly, it presented a federal question to the district court. Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

Stone presented evidence which demonstrated that there were genuine issues of material fact. Drawing all inferences in Petitioner's favor, as the court is required to do in reviewing a summary judgment motion, summary judgment

should have been denied. Instead, the Tenth Circuit held Stone to a standard similar to the Fifth Circuit's in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. __ (2000), slip. op. at 3-4.

The Tenth Circuit found that Stone had established a prima facie case but concluded that there was no additional evidence to establish pretext. *Stone*, 210 F.3d at 1139. The Tenth Circuit, concluded that Stone's supervisor's ageist statement that he guessed "at [Stone's] age it would be difficult to do anything else" was merely a stray remark and therefore not sufficient to create a jury question. The circuit court did not consider the evidence supporting the prima facie case or other evidence in reaching its decision. *Id.* at 1140-41. This ignored specific evidence that a younger employee was given an open position during the reorganization. *Stone*, 210 F.3d 1138-39 & nn. 2-3. Given the standard enunciated in *Reeves*, the opinion of the Tenth Circuit was in error.[3]

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3. The practice in the Tenth Circuit is to instruct the jury only on the ultimate question of fact in discrimination cases, and not about the burden-shifting analysis and its related presumption. *Messina v. Kroblin Transp. Sys. Inc.*, 903 F.2d 1306, 1309 (10th Cir. 1990). Thus, the evidence ultimately to be presented to the jury consists of all admissible evidence. It is from this evidence, and all of it, that a jury must be conclude whether the plaintiff was terminated as a result of his age. Accordingly, it is particularly significant that a court be required to consider the whole realm of evidence as instructed in *Reeves*. Evidence should not be minced, sorted, and reviewed piecemeal. Nothing in federal anti-discrimination jurisprudence requires such a result and much counsels against it. *Reeves*, slip op. at 13, 15. (Noting that discrimination is no different than other ultimate questions of law and that all of the evidence in record should be reviewed to determine propriety of judgment as a matter of law).

The present case rests on the *Reeves* analysis in the context of summary judgment. The standards for granting judgment as a matter of law and granting summary judgment "mirror" each other. *Reeves*, slip op. at 15, *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). Moreover, under both Rule 50 and Rule 56 "the court must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh evidence." *Reeves*, slip op. at 15.

I.

THE TENTH CIRCUIT IMPOSED AN INAPPROPRIATE STANDARD OF PROOF ON PLAINTIFF, AFTER HAVING CONCLUDED THAT PLAINTIFF HAD ESTABLISHED A PRIMA FACIE CASE.

In the present case, the Tenth Circuit wrote that

> [t]he record simply does not support Stone's position that there is more to his claim of pretext than [his supervisor's] stray remark. *Were there more evidence*, or a stronger showing of nexus, Stone's claim of pretext might well rise to the level of a jury question, *but with Seebock's remarks standing alone*, our decision is foreordained.

Stone, 210 F.3d at 1140 (emphasis added). This standard is contrary to the *Reeves* formulation: "The trier of facts may still consider the evidence establishing the Plaintiff's prima facie case and inferences properly drawn therefrom on the issue of whether the Defendant's explanation is pretextual." *Reeves*, slip op. at 8 (internal quotations and citations

omitted). In the context of summary judgment, a court must consider all of the evidence, including the evidence establishing a prima facie case. A comparison to the facts of *Reeves v. Sanderson* is illustrative. In *Reeves*, a fifty-seven year old supervisor was terminated. The proffered reason for the termination was error in timekeeping and other paperwork. *Reeves*, slip op. at 2. Reeves claimed that this reason was mere pretext for age discrimination. A jury agreed and found in his favor. The Fifth Circuit reversed, holding that Sanderson was entitled to judgment as a matter of law, under Fed. R. Civ. P. 50. Specifically, the Fifth Circuit held that age-based comments were not made in the "direct context" of Reeves' termination. *Id.* at 4.

In *Reeves* this Court reviewed the evidence showing that Sanderson's asserted basis for termination was false. In particular, Reeves presented evidence that he did keep proper time records, thereby casting doubt on Sanderson's proffered basis for termination. The Fifth Circuit "believed that only th[e] additional evidence [of ageist remarks] of discrimination was relevant to whether the jury's verdict should stand. *Id.* at 11. This Court rejected that limited view and held instead that a jury's disbelief of the proffered reason — particularly when accompanied by a suspicion of mendacity — together with the evidence supporting the prima facie case, "suffices to show intentional discrimination." *Id.* at 11-12, *quoting St. Mary's Honor Center*, 509 U.S. at 511.

This case is similar. The Tenth Circuit held that Stone made a prima facie case. It then weighed the *remaining* evidence, limiting its review to Seebock's discriminatory remark only, ignoring both the evidence supporting a prima facie case as well as other evidence.

In the present case, there are four specific areas of evidence, three of which the Tenth Circuit ignored, which support Stone's position. The only evidence of pretext considered by the Tenth Circuit, was the ageist statement made by Seebock to Stone. In order to consider the remark, the Tenth Circuit demanded that a "stronger showing of nexus" between the remark and the adverse employment decision (termination and elimination from consideration for other positions) be shown. It is difficult to imagine how much stronger the nexus could be. The statement was made by the decision-maker directly to the affected employee within a day of the employment decision.

Second, Stone's supervisor displayed mendacity, if not outright dishonesty, in his responses to Stone during the same meeting. Stone specifically requested to know the status of his job. Mr. Seebock, the supervisor, falsely responded that he did not know. Seebock had put Stone's name on a list of employees in his department who "did not have a slot" only the day before. The list was qualified in that it was "subject to changes at the plants." Indeed, Seebock testified that as of mid-May he believed the position might still go to a plant. Yet, he talked only to members of the central staff in his belated search for another position for Stone; he did not speak to anyone connected with plant management regarding either the position of strategic planning or in relocating Stone to another position. He further falsely implied to Stone on 16 May that the decision was still up to Musone, though Musone testified that he had no involvement in the decision. Seebock's duplicitous acts could support a finding of mendacity and a disbelief of the proffered explanation for the actions taken against Stone.

The third piece of evidence ignored by the Tenth Circuit is the management policy relating to seniority in reductions in force. Stone met the elements of qualification, performance, and seniority the policy required. He had twelve years of program management experience, had always received above-average to superior ratings, and had eighteen years seniority. But even when positions became open during the reorganization, he was not considered for them.[4] *Stone*, 210 F.3d at 1138-39. This policy was simply ignored as to Stone and he was not given the benefit of his seniority and ultimately terminated as a result. Respondent has never offered any reason why this policy was not followed in Stone's case; the policy was in force and it applied to him. While Respondent did offer the RIF itself as a legitimate, non-discriminatory reason for terminating Stone, they have not explained their failure to apply the policy.[5]

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4. The Tenth Circuit specifically held that Stone presented sufficient evidence to constitute a prima facie case. In particular, they referred to the specific fact that the position of Manager of General Motors Programs fell vacant as a result of the reorganization. *Stone*, 210 F.3d at 1138-39. When questioned about this position, Tea, the Vice-President of Human Resources, testified, in direct contravention of the management policy, App. D, that Stone was not considered for the position. Tea further stated that he did not know why Stone was not considered.

5. While a RIF may be a legitimate business decision, it does not immunize an employer from complying with the ADEA. "If the trier of fact finds that the elements of the prima facie case are supported by a preponderance of the evidence, and the employer remains silent, the court must enter judgment for the plaintiff." *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 308, 311 (1996), *citing St. Mary's Honor Center*, 509 U.S. at 509-10.

Fourth, in direct contravention of the well-established principles affirmed by *Reeves*, the lower courts failed to consider that the evidence which sustained Stone's prima facie case would also be relevant in whether Stone established his ultimate case of illegal discrimination.

From these four items of evidence, a jury could reasonably and rationally conclude that Respondent's explanations were unworthy of credence. This Court has previously held that

> the fact finder's disbelief of the reasons put forward by the Defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination. Thus, rejection of the Defendant's proffered reason will permit the trier of fact to infer the ultimate fact of intentional discrimination.

St. Mary's Honor Center, 509 U.S. at 511. Given the standards for summary judgment, a court ought to conclude that a trier of fact would make just such an inference. The Tenth Circuit's Opinion ignored the evidence undergirding the prima facie case once it found that a prima facie case was made.

Based upon this cramped review, it then sustained the district court's grant of summary judgment. *Stone*, 210 F.3d at 1140-41. The Tenth Circuit's analysis, arising in the context of summary judgment, partakes of the same errors and the same unfairness as the Fifth Circuit's *Reeves* analysis. This is particularly true if the evidence is viewed as a whole and not artificially sliced into separately analyzed specimens.

Because Stone's prima facie case and the additional evidence were sufficient to allow a jury, by a preponderance of the evidence, to reject Respondent's explanation and permit a finding of liability, the Tenth Circuit erred in requiring more. Like *Reeves*, the Tenth Circuit applied an erroneously strict standard and arrived at the wrong conclusion. Its decision should be reversed as was *Reeves*. This court should grant certiorari to insure that *Reeves*' standards are equally applicable in the context of summary judgment.

II.

SUMMARY JUDGMENT WAS IMPROPER

In addition to ignoring the standards the *Reeves* court affirmed, the Tenth Circuit and the district court wrongly concluded that no disputed issue of material fact existed in this case. The existence of these facts precluded summary judgment. These facts were:

> 1. The reorganization did not inevitably lead to a reduction in force and no one other than Seebock made any effective decision to eliminate Stone or his position. The preponderance of the evidence, documentary and testimonial, provides an ample base from which a finder of fact could reasonably conclude that the decision was not a team effort as the district court concluded, but that Seebock was the decision-maker.
>
> 2. Under the company's written management policy, Stone should have been given consideration for other open positions based upon his qualifications, performance and seniority. This

did not occur. Any efforts undertaken by Seebock to secure another position for Stone were feckless given the lateness in the process when they occurred. Non of the three calls Seebock claimed to have made on behalf of Stone resulted in Stone even being considered for another position, although positions had been open during the process. Tea testified that there was nothing available for Stone based on Tea's understanding of Stone's background, although Tea also admitted that he had not reviewed Stone's personnel file to determine his background. Kirchoff, the Vice-President of Program Management, to whom the GM position reported, testified that Seebock failed to inform him that Stone's position was to be eliminated.

3. The nexus between Seebock's decision to eliminate Stone's position and his ageist remark was close and palpable; it was not merely a "stray" remark. The remark was made by the decision-maker directly to the affected employee shortly after the employment decision was made. The remark concerned Stone and his job specifically and was made in a meeting held for the purpose of discussing the future of Stone's position. Seebock's remark was coupled with his deliberate misinformation regarding the true status of the job based upon his actual knowledge at the time of the meeting. *Id.*

As to each of these facts, both the district court and the Tenth Circuit erroneously drew inferences against Petitioner. Regarding the first and second of the facts, the District Court held: "Additional depositional testimony, notable that of

Mr. Tea and Mr. Seebock, reveals that the decisions for the reduction in force were a team effort, based upon Mr. Musone's [unwritten] restructuring plan." App. B at 39a-40a. Yet, the district court also noted that the identity of the decision-maker was disputed: "Although the parties dispute the extent of Mr. Seebock's involvement in the decision to eliminate the plaintiff's job, this factual dispute does not change the nature of Mr. Seebock's alleged discriminatory remark to the plaintiff." App. B at 34a. It is simply wrong to grant summary judgment, weighing material facts on one page and then admit that the same facts are actually disputed on another. The Circuit Court appears to have adopted this error. *Stone*, 210 F.3d at 1141.

In addition to Musone's testimony that the decision was left to Seebock alone, there are additional points in the evidence to consider. The record shows that Tea, although claiming to have personally made the decision, gave no real consideration to Stone or his qualifications; that Seebock put Stone's name on the list and no one, including Tea, reviewed it or questioned it. It was Seebock who misled Stone about the elimination of his position and it was Seebock who failed to mention that Stone was to be terminated when making calls to Kirchoff. A reasonable fact finder could conclude, based upon this evidence, that Seebock was the sole decision maker and that the reorganization did not inevitably lead to the elimination of Petitioner's position.

Equally important, Seebock's role decisively alters the nature — or the legal significance — of the remark. A remark made by a non-supervising peer may be rejected since it is simply not probative of discriminatory animus, and therefore a "stray" remark; the same remark made by a vice-president charged with making the very decision being challenged cannot reasonably be brushed aside, particularly not on summary judgment.

The Tenth Circuit ignored all of this and dismissively categorized Seebock's comment as a mere "stray" remark and therefore insufficient to create a jury issue. *Stone*, 210 F.3d at 1140, *citing Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994), *quoting Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025 (6th Cir. 1993). The notion of a "stray remark" has never been endorsed by this Court. To the contrary, the concept runs afoul of this Court's injunction that "trial courts should not 'treat discrimination differently from other ultimate questions of fact.' " *Reeves*, slip op. at 13, *quoting St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993). Judging a remark to be "stray" is just a way of disguising that one is weighing evidence. The Tenth Circuit by indulging in the forbidden practice of weighing the evidence to determine the propriety of summary judgment concluded that Petitioner did not clear the hurdle of showing pretext *See, e.g., Stone*, 210 F.3d at 1139-40.

To attempt to justify this categorization of Seebock's remark as "stray", the Tenth Circuit weighed three points. First, Seebock wasn't the decision-maker and therefore the remark was "stray." Second, Seebock had never, to Stone's knowledge, made such a comment before. Third, Seebock did not know Stone's precise age. None of these reasons withstand scrutiny. Regarding Seebock's role as the decision maker, as noted above, there is ample evidence from which a jury could conclude that Seebock was the decision-maker and that his decision was improperly motivated.

The fact that Stone had never heard Seebock make such a remark previously and that that fact bears on the legal significance of Seebock's ageist remark on 16 May is simply fallacious reasoning. One may not logically presume that

Seebock's remark was "stray" premised upon the absence of evidence of prior similar remarks. It may be a relevant fact for a jury to consider, but it is hardly dispositive as a matter of law. More importantly, however, is that the remark is probative evidence that an illegal factor, age, tainted the process employed to eliminate Stone's job, to prevent him from being considered for other jobs, and to eliminate his position. Lastly, although Seebock may not have known Stone's specific age, Stone is obviously over forty years of age. Seebock's comment demonstrated that he knew Stone's age was at least problematic.

Summary judgment is appropriate only when there are no disputed issues of material fact. Fed. R. Civ. P. 56(c). All inferences are to be drawn in favor of the non-moving party. Issues of credibility, motive, and intent are not proper for summary judgment. *Hardin v. Pitney Bowes*, 451 U.S. 1008, 1009 (1981) (Rehnquist, J., dissenting in denial of petition for certiorari). In a case governed by the *McDonnell-Douglas* framework, an additional layer of analysis is present. The tripartite analysis governs the orderly presentation of evidence and may give a plaintiff the benefit of an evidentiary presumption; but, the burdens of proof and persuasion on the ultimate issue, illegal discrimination, never leave the Plaintiff. *St. Mary's Honor Center*, 509 U.S. at 508. However, this analysis is only an analytical adjunct to reach the ultimate issue of age discrimination; it should not be deployed to deny a plaintiff "the full and fair opportunity to demonstrate" that the employer's proffered reason was pretextual. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). The Tenth Circuit erred in requiring Stone to show more than this. Its decision should be reversed and remanded for reconsideration in light of *Reeves*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BRAD C. SMITH
Counsel of Record
STEVENSON & SMITH, P.C.
Attorneys for Petitioner
2605 Washington Boulevard
Suite 300
Ogden, Utah 84401
(801) 394-4573

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED APRIL 11, 2000

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 98-4074

JAMES STONE,

Plaintiff – Appellant,

v.

AUTOLIV ASP, INC., formerly known as Morton International, Inc.,

Defendant – Appellee.

Appeal from the United States District Court for the District of Utah
(D.C. No. 96-CV-6-S)

* * *

Before **BRORBY** and **LUCERO**, Circuit Judges, and **WEST***, District Judge.

LUCERO, Circuit Judge.

This case arises from a reduction in force ("RIF") instituted in 1995 by defendant Autoliv ASP, Inc., a

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* Honorable Lee R. West, District Judge of the Western District of Oklahoma, sitting by designation.

manufacturer of airbags. As a result of the RIF, James M. Stone was terminated after eighteen years of working for Autoliv. Stone sued Autoliv for discrimination in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634. The district court granted Autoliv summary judgment, from which Stone appeals.

Our determination on review turns on (1) whether Stone has established a prima facie case of age discrimination by demonstrating that there were positions at Autoliv similar to his in which younger workers were placed; and (2) whether the evidence Stone presented — primarily a comment made by his supervisor, Charles H. Seebock, who allegedly stated that "at [Stone's] age, it would be difficult to train for another position" or "difficult to find a new job," (II J.A. at 24, 48) — is sufficient to show directly or circumstantially that age was a determining factor in the decision to terminate him. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm. Although we disagree with the district court's finding that Stone has not established a prima facie case of age discrimination because he has pointed to a younger employee placed in a similar position, we nevertheless affirm the district court's grant of summary judgment for Autoliv because Seebock's single comment is neither direct evidence of discrimination, nor sufficient to establish that the RIF was proffered as a pretext for discrimination.[1]

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1. We may affirm the district court's dismissal of an action on a different ground if the record is sufficient to allow conclusions of law. *See United States v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994).

Appendix A

I

From March 1977, until his termination on June 5, 1995, Stone worked for Autoliv or its predecessor companies, most recently as Manager of Advanced Strategic Planning. Immediately prior to holding that position, Stone was the Manager of European Programs. During the course of his employment, he consistently received above-average performance evaluations.

Rumors speculating that "[t]here would be some type of reorganization" within the company began to circulate in early 1995, when Frank Musone became Autoliv's new company president. (II J.A. at 19-21.) As part of the reorganization process, Seebock prepared a "tentative list" on May 15, 1995, of approximately twenty-five employees "without a slot," including Stone. (*Id.* at 340). Seebock's list noted that it was "subject to change based on plant changes." (*Id.*) At a staff meeting Stone attended the next day, Seebock reminded his managers that lists of positions were due. Surmising that these lists were related to the reorganization, Stone met with Seebock to inquire about his future with the company. At this meeting, Seebock stated he did not know about the future of Stone's position with the company because he had not discussed it with Musone yet, but that "at [Stone's] age, it would be difficult to train for another position" or "difficult to find a new job." (*Id.* at 24, 48). This comment constitutes the primary evidence Stone presents to support his allegation of age discrimination. Prior to this conversation, Seebock had never mentioned Stone's age in the eight years they had worked together. Although Stone is not sure if Seebock knew his age at the time of the

ageist comment, he asserts that no reasonable person could mistake him for being younger than forty.

On June 2 or 3, 1995, Stone learned that his position would be eliminated effective June 5, 1995, due to company-wide restructuring. Prior to Stone's termination, Seebock attempted to locate another position for him, calling Stone's former supervisor and the vice presidents of human resources and engineering; none of the three could place Stone. Stone does not dispute this fact, but asserts that Seebock's actions were taken too late to allow him to be considered for other available positions. Stone, uncertain whether his position would be eliminated by the anticipated RIF, made no efforts to investigate other available positions with Autoliv, but did send a resume to Autoliv in July 1995, expressing interest in returning to work. According to Stone, Seebock alone made the termination decision, but the record belies that assertion. Overall, as a result of the reorganization, 324 Autoliv employees were terminated. At the time of the termination, Stone was almost fifty-three years old.

Stone contends there were other positions in which Autoliv could have placed him following the elimination of his strategic planning position. Employees, at least one of whom was younger than Stone, were selected for new "plant manager" positions. In addition, the position of program manager for General Motors, one allegedly analogous to Stone's position in European Programs held prior to his strategic planning job, became available during the restructuring, but was given to another, younger employee. Stone also alleges that a younger worker was appointed to the newly created position of "Manager, Process Redefinition." (I J.A. at 76).

Appendix A

II

Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the district court's decision to grant summary judgment, we view the evidence "in the light most favorable to the party opposing summary judgment." *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996) (quoting *Wolf v. Prudential Ins. Co.*, 50 F.3d 793, 796 (10th Cir. 1995)). The substantive law at issue determines which facts are material in a given case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

A

The ADEA states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). "A plaintiff who seeks to prove that an employer discriminated against him or her can use either direct or circumstantial evidence." *Ingels v. Thiokol Corp.*, 42 F.3d 616, 620 (10th Cir. 1994); *see also Jones v. Unisys Corp.*, 54 F.3d 624, 630 (10th Cir. 1995) (noting that "we have adapted for ADEA cases" the indirect methods of proof of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). A plaintiff proves discrimination through direct

evidence by establishing proof of "an existing policy which itself constitutes discrimination." *Ramsey v. City & County of Denver*, 907 F.2d 1004, 1008 (10th Cir. 1990) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984)).

"Statements which on their face are expressions of personal opinion, however, can only support an inference of discrimination if the trier of fact finds the inference reasonable, and so constitute only circumstantial or indirect evidence of discrimination against the plaintiff." *Tomsic v. State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1477 (10th Cir. 1996) (citing *Ramsey*, 907 F.2d at 1008). Stone argues that Seebock's comment cannot be "ignored as merely 'personal opinion' but take[s] on the character of a statement of policy, particularly given Seebock's high position within Defendant's structure." (Appellant's Br. at 28.) However inappropriate this statement may be, it is "not direct evidence of causation on the employment decision." *Ramsey*, 907 F.2d at 1008 (holding that a division director's "feelings about women being better suited to some jobs than others" were circumstantial or indirect and not direct evidence of discrimination); *see, e.g.*, *Perry v. Woodward*, 199 F.3d 1126, 1134-35 (10th Cir. 1999) (concluding that racist statements regarding hiring barriers were not direct evidence of discriminatory motivation for termination); *Tomsic*, 85 F.3d at 1477, 1478 (characterizing as indirect evidence a supervisor's comments that a plaintiff could be expected to lack motivation because of her husband's income and another plaintiff would have marital problems because her husband would be uncomfortable earning less than her); *EEOC v. Wiltel, Inc.*, 81 F.3d 1508, 1513-14 (10th Cir. 1996)

(characterizing as indirect evidence a comment that an interviewer did not "like" the plaintiff because she was "into" her religion); *Heim v. Utah*, 8 F.3d 1541, 1546-47 (10th Cir. 1993) (holding that one supervisor's single statement that he hated having women in the office, unconnected to the personnel action at issue, was not direct evidence of a discriminatory policy); *Furr v. AT & T Techs., Inc.*, 824 F.2d 1537, 1547, 1549 (10th Cir. 1987) (holding repeated statements by managers that plaintiffs were "too damned old," were too old to learn new technologies or to be in management positions, and did not have a future with the company because of age were not direct evidence of a causal relationship between discrimination and failure to promote). *But see Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 560 (10th Cir. 1996) (noting that a plaintiff may prove a direct evidence case "by presenting direct or circumstantial evidence that age was a determining factor in his discharge") (quoting *Lucas v. Dover*, 857 F.2d 1397, 1400 (10th Cir. 1988)). At most, such statements provide circumstantial evidence of discriminatory intent because they "require the trier of fact to infer that discrimination was a motivating cause of an employment decision." *Wiltel*, 81 F.3d at 1514 (citing *Heim*, 8 F.3d at 1547; *Ramsey*, 907 F.2d at 1008; *Furr*, 824 F.2d at 1547, 1549). Here, Seebock's comment reflects his personal opinion, not an existing company policy, and therefore it does not constitute direct evidence of discrimination.

B

Upon concluding that Stone has not presented direct evidence, we must turn to the indirect method of proof.

established by *McDonnell Douglas*. *See, e.g.*, *Wiltel*, 81 F.3d at 1514-15. This burden-shifting framework first requires plaintiffs to prove a prima facie case. *See McDonnell Douglas*, 411 U.S. at 802. To establish a prima facie case of age discrimination in the RIF context, a claimant affected by a RIF must prove: (1) the claimant is within the protected age group; (2) he or she was doing satisfactory work; (3) the claimant was discharged despite the adequacy of his or her work; and (4) there is some evidence the employer intended to discriminate against the claimant in reaching its RIF decision. *See Ingels*, 42 F.3d at 621. The fourth element may be established "through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the [RIF]." *Id.* (quoting *Lucas*, 857 F.2d at 1400).

Establishing a prima facie case of age discrimination under the ADEA creates a presumption of discriminatory intent that the defendant may rebut by asserting a facially nondiscriminatory reason for the employee's termination. *Id.* The plaintiff may then resist summary judgment if she can present evidence that the proffered reason was pretextual, "i.e. unworthy of belief," *see Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995), or "otherwise introduces evidence of illegal discriminatory motive," *id.* at 453.

Autoliv does not dispute the first three elements required for the showing of a prima facie case for the purposes of its summary judgment motion. Rather, it contends Stone does not meet the fourth factor of the prima facie test because he cannot establish that he was treated less favorably than younger employees during the RIF.

Stone argues younger employees were placed, respectively, in a position that he previously held in the company and in other positions for which he was qualified, and that Autoliv "refused to even consider bumping the less senior person." (Appellant's Br. at 20.) Thus, he claims there were two adverse employment actions: losing his job and not having the opportunity to compete for positions during the reorganization. Stone asserts many other employees knew of the reorganization while he did not.

The standards applicable to the fourth element of a prima facie case of discrimination in the context of a RIF are not fully defined. *See Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1166 (10th Cir. 1998). Although "[e]vidence that an employer fired qualified older employees but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent[,]" *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988), questions such as "whether a single younger employee retained in a similar position is sufficient to establish the fourth element, or how similar a position must be in order to be relevant under *Branson*," remain unanswered. *Beaird*, 145 F.3d at 1166.

As explained in *Beaird*, we look to the purpose of the *McDonnell Douglas* framework to determine how to apply the framework to fit the unique nature of RIF cases:

> [A] prima facie case simply eliminates the most common nondiscriminatory reasons for plaintiff's rejection, namely lack of qualifications or the absence of a vacancy in the job sought. More specifically, the second element of the *McDonnell*

> *Douglas* prima facie case — that the plaintiff be qualified — and the fourth element — that the position remained open — perform this elimination role.
>
> . . . .
>
> Thus, the fourth element of *Branson* should be understood to parallel the fourth element of *McDonnell Douglas* by eliminating lack of vacancy as a legitimate nondiscriminatory motive for the employment decision. Once the first three elements have been satisfied, that elimination is all that is required to give rise to a prima facie case.

Id. at 1166-67 (internal quotations and citations omitted).

Examining the factual circumstances in *Branson* demonstrates the practical application of the *McDonnell Douglas* framework in RIF cases. In *Branson*, a plaintiff was terminated pursuant to a RIF from her position as accounts payable supervisor. *See Branson*, 853 F.2d at 769-70. The RIF directive required the accounting department to eliminate one of its four employees. *See id.* at 770. In the accounting department, the other three positions — general manager, cost accountant, and payroll supervisor — were not identical to plaintiff's eliminated position. *See id.* The other plaintiff, a traffic supervisor and administrative assistant who was terminated because her job duties were eliminated, asserted that "she was equally or more qualified for several other positions in her department that were instead retained by younger employees." *Id.* at 769. Emphasizing that "reduction

in force cases present exigencies not present in other employment discrimination cases" and that "these exigencies are best analyzed at the stage where the employer puts on evidence of a nondiscriminatory reason for the discharge," the *Branson* court held "[e]vidence that an employer fired qualified older employees but retained younger ones in similar positions" is sufficient to conclude that both plaintiffs established a prima facie case. *Id.* at 771 (citation omitted). That the former traffic supervisor might have needed training to assume another position, *id.* at 772, was not relevant to determining whether she had established a prima facie case of age discrimination because she did not need to show that "she [was] as or more qualified than employees who [were] retained." *Beaird*, 145 F.3d at 1168 n.5 (citing *Branson*, 853 F.2d at 771 n.6). To establish a prima facie case, it is only necessary for a plaintiff to "point to circumstances that show that the employer could have retained her, but chose instead to retain a younger employee," because after a RIF, it is impossible for plaintiff to "point to a continuing vacancy because her position has been eliminated." *Id.* at 1167.

Therefore, in order for Stone to establish a prima facie case of age discrimination, he must establish that Autoliv retained or placed younger employees in similar positions. To do so, Stone points to three "similar positions" allegedly filled by younger employees during the reorganization: program manager for General Motors, plant manager positions, and an entirely new management position, "Manager, Process Redefinition."[2] (I J.A. at 76.)

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2. Manager of European Programs, Stone's second most recent position with Autoliv, was not eliminated during the RIF and is (Cont'd)

Appendix A

Various Autoliv personnel involved in organizing the RIF, including Stone's supervisor, Seebock, testified that the General Motors position was similar to the work Stone had done at Autoliv in recent years and he could be a candidate for that position. Seebock testified that there was a "lot of similarity" between the program manager for General Motors and the responsibilities Stone had in the European market. (II J.A. at 183.) He also stated that based on Stone's experience and his "work as European program manager for a number of years," he "felt [Stone] could have possibly filled an engineering or program management position." (*Id.* at 191.)

The prima facie case was " 'never intended to be rigid, mechanized, or ritualistic,' " *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)), "particularly in an age discrimination case," *MacDonald v. Eastern Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1121 (10th Cir. 1991) (citing *Pace v. Southern Ry. Sys.*, 701 F.2d 1383, 1387 (11th Cir. 1983)). Our similarity analysis is complicated by the fact that Stone's duty in his most recent position as Manager of Advanced Strategic Planning was to perform long-range planning generally and, as no one reported to him,

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(Cont'd)
asserted as a similar position in which a younger employee was retained. Although Roger Tea, vice-president for human resources, testified that Stone "would have been a candidate to be going back to European programs" had there been a vacancy (I J.A. at 238), Stone fails to present evidence that the employee retained in this position, Steve Goch, was younger. Even if Stone had presented evidence that Goch was younger, it does not affect the outcome of the case because Stone already established a prima facie case of age discrimination based on the General Motors position.

the position existed essentially in a single-person department. The General Motors job for which Stone was allegedly qualified involves skills from his past position as Manager of European Programs and is a job for which his supervisor, Seebock, likewise thought he was qualified. Thus, the fact that a younger employee was placed in this position satisfies the fourth factor of a prima facie case of age discrimination.[3]

Autoliv responds by citing company-wide statistics. It is undisputed that 324 employees were terminated around the same time as Stone as a result of the RIF. More importantly, according to Autoliv, is the undisputed fact that the net effect of the RIF was to actually increase, albeit slightly, the percentage of workers at Autoliv who were age forty or over.[4] Autoliv argues that this negates Stone's prima

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3. There is no evidence that the plant manager positions or the newly created job of "Manager, Process Redefinition" were similar to Stone's most recent position as Manager of Advanced Strategic Planning or his prior position as Manager of European Programs. Rather, the evidence indicates that they were quite different. The plant managers were new positions and were not similar to any positions previously existing in the company; prior to their creation there was "no one person at the plantsite [sic] that was responsible for everything," and therefore it encompassed duties previously held by "manufacturing, Materiel people, human resource people; all of those reporting back to the respective functional vice presidents." (I J.A. at 184.) The "Manager, Process Redefinition" (*id.* at 76), was responsible for the "prototype manufacturing process" — the prototypes being the "samples [Autoliv was] manufacturing to be sold." (II J.A. at 321.) Stone has presented no evidence indicating that these newly created positions were analogous to his prior jobs.

4. Specifically, before the RIF 24.7% of employees were age 40 or over, compared to 24.8% after the RIF.

facie case. While a "balanced workforce cannot immunize an employer from liability for specific acts of discrimination," *Furnco*, 438 U.S. at 579, statistics concerning employees terminated in a RIF are probative to the extent they suggest that older employees were not treated less favorably than younger employees, *see Lucas*, 857 F.2d at 1403 (finding that statistics concerning all supervisory employees terminated in the RIF did not assist plaintiffs argument because "what evidentiary value they have suggests that older employees were not treated unfavorably") (citations omitted). Such evidence, however, is more appropriately evaluated against the employer's proffered legitimate, nondiscriminatory reason for termination. *See Branson*, 853 F.2d at 769.

C

Having established a prima facie case under the ADEA, Stone benefits from a presumption of discriminatory intent that Autoliv may rebut by asserting a facially nondiscriminatory reason for the employee's termination. *See, e.g., Ingels*, 42 F.3d at 621. Here, for the purposes of summary judgment, Stone does not dispute that the RIF suffices for Autoliv's asserted facially nondiscriminatory reason for his termination. Once a defendant asserts a facially nondiscriminatory reason for the termination, "the presumption of discrimination established by the prima facie showing 'simply drops out of the picture,' " and the analysis shifts to the plaintiff's ultimate burden of showing that the defendant discriminated on the illegal basis of age. *Id.* (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)). A plaintiff may then resist summary judgment if he

or she can present evidence that the proffered reason was pretextual, "i.e. unworthy of belief." *Randle*, 69 F.3d at 451. "Effective cross-examination, combined with the plaintiff's initial evidence, may be sufficient to effect this task." *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1103 (10th Cir. 1998) (citations omitted); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

There are three common methods used to demonstrate pretext in the RIF context: (1) evidence that the termination of the employee is inconsistent with the employer's RIF criteria; (2) evidence that the employer's evaluation of the employee was falsified to cause termination; or (3) "evidence that the RIF is more generally pretextual." *Beaird*, 145 F.3d at 1168. These methods do not foreclose the possibility of others. *See id.* at 1168 n.6. Stone relies on Seebock's alleged comment for purposes of establishing that the elimination of his position without transferring him to an open position was "generally pretextual." *Id.* at 1168.

At the crux of Stone's case is Seebock's comment that "at [Stone's] age, it would be difficult to train for another position" or "difficult to find a new job." (II J.A. at 24, 48.) This statement is best characterized as a "stray remark." *See, e.g., McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998). As such it is insufficient to create a jury issue in an employment discrimination case. Age-related comments referring directly to the plaintiff can support an inference of age discrimination, but "isolated [or] ambiguous comments" may be, as here, too abstract to support such an inference. *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994) (quoting *Phelps v. Yale Sec., Inc.*,

986 F.2d 1020, 1025 (6th Cir. 1993)). The court in *Cone* further reasoned that "[i]solated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions." *Id.* (citing *Leichihman v. Pickwick Int'l*, 814 F.2d 1263, 1271 (8th Cir. 1987)). A plaintiff must demonstrate a nexus exists between the allegedly discriminatory statement and the company's termination decision, *see id.*, and therefore "that age actually played a role in the defendant's decisionmaking process and had a determinative influence on the outcome," *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir. 1994) (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

Our review of the record simply does not support Stone's position that there is more to his claim of pretext than this stray remark. Were there more evidence, or a stronger showing of nexus, Stone's claim of pretext might well rise to the level of a jury question, but with Seebock's remark standing alone our decision is foreordained. Stone relies on *Tomsic*, 85 F.3d at 1478, in an attempt to establish that Seebock's comment shows age was a determining factor in his termination. In *Tomsic*, however, the supervisor explicitly told one plaintiff she would not succeed in her training program and that she would lack incentive because her husband made too much money, while at the same time telling others that she would be fired. *See id.* at 1474-75, 1479. A permissible inference from these comments is that Tomsic's supervisor had preconceived notions premised on her gender regarding her possibilities for success with the company and ultimately terminated her based at least in part on his gender bias. *See id.* at 1479; *see also Furr*, 824 F.2d at 1547, 1549 (upholding finding of willful discrimination

based in part on repeated statements by managers that the plaintiffs did not have a future with the company because they were "too damned old" and would be too old to learn new technologies or to be in management positions).

Here, in eight years of working with Seebock, Stone admits Seebock never made an age-related comment to him, and he is not even sure that Seebock knew his age. Stone concedes Seebock contacted three others within the company inquiring about openings for him, even though he contends these actions were taken too late to be helpful. With regard to placement in other positions in the company, Stone himself admits that, while other similar jobs were available, there was no position available that matched his skills and talents at the time of the RIF. (II J.A. at 37, 52-56); *see Branson*, 853 F.2d at 772 (holding that the plaintiff failed to establish pretext where, among other factors, the plaintiff "admit[ted] she would have required at least minimal training to assume any of the positions retained by younger employees"). Moreover, it is undisputed that 324 employees were terminated as a result of the RIF, slightly increasing the percentage of workers at Autoliv who were age forty or over. Although such statistics do not immunize Autoliv from liability, *see Furnco*, 438 U.S. at 579, they further undermine Stone's unsupported assertion that older employees were treated less favorably than younger employees in the RIF, *see Lucas*, 857 F.2d at 1403. The Tenth Circuit has established that a single age-related comment, even if made by a decisionmaker, may not be "sufficient to infer discriminatory intent." *McKnight*, 149 F.3d at 1129 (holding that the plaintiff failed to show pretext based solely on the comment of a supervisor at the time of termination stating

that "he [the supervisor] was not as old" as McKnight). Thus, examining Seebock's comment in light of all of the evidence, we conclude it is insufficient for a reasonable jury to infer that age was a determining factor in the decision to terminate Stone. Nor has Stone directed our attention to contradictory statements that would reasonably allow him to cast doubt onto Autoliv's explanation through cross-examination of company decisionmakers. *Cf. Roberts*, 149 F.3d at 1103.

III

Although Stone was able to demonstrate a prima facie case of age discrimination, he did not present evidence sufficient for a jury to conclude that Autoliv's reason for termination was pretextual. The district court's grant of summary judgment is **AFFIRMED**.

APPENDIX B — MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, NORTHERN DIVISION DATED AND FILED APRIL 29, 1998

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

Case No. 1:96-CV-0006-S

JAMES STONE,

Plaintiff,

vs.

AUTOLIV ASP, INC., formerly known as
MORTON INTERNATIONAL, INC.,

Defendant.

MEMORANDUM DECISION

Before the court is a motion for summary judgment submitted by defendant Autoliv ASP, Inc., formerly known as Morton International, Inc.[1] The court, having reviewed the briefing submitted by the parties, will rule on the motion without the assistance of oral argument, pursuant to DUCivR 7-1(f).

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1. Defendant's name change, from Morton International, Inc. to Autoliv ASP, Inc., occurred while this suit was pending. The term "defendant", as used by the court in this ruling, refers to both entities, whichever is appropriate for the time frame.

Appendix B

UNDISPUTED FACTS

Plaintiff James M. Stone, Jr. began working for defendant in March 1977. He was a program manager and later became Manager of European Programs. He consistently received above-average or superior rankings on his performance evaluations. In October 1993, plaintiff became Manager of Advanced Strategic Planning and Business Development. This position involved long-range planning, and no employees reported to plaintiff while he held this position.

In January 1995, Fred Musone became defendant's new company president. At the same time, plaintiff heard rumors that "there would be some type of reorganization" within the company. Plaintiff understood this reorganization involved "an overall direction of decentralization" for the company.[2] As part of the company's restructuring, new positions called "plant managers" were created. Plant managers were responsible for the entire process occurring within a particular physical facility. Once chosen, new plant managers began to develop their organizations, selecting from among company employees.

Plaintiff had approximately three informal meetings with his supervisor, C. H. Seebock, "inquiring what the future of

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2. Defendant's Chairman of the Board explained that the reorganization "was fundamentally the result of a change in the way the Automotive Safety Products Group performs its work. It represented a shift in emphasis from heavily centralized administrative and staff functions, such as strategic planning, to a decentralized, plant oriented approach to the accomplishment of management tasks."

the strategic planning position would be." Plaintiff testified that Mr. Seebock's response each time was "noncommittal", in that Mr. Seebock stated he did not know the future of the strategic planning position, and that it would likely depend upon Mr. Musone.

Mr. Seebock prepared a list of employees, dated May 15, 1995, which comprised "the tentative list of the folks without a slot." Mr. Seebock noted "[t]his list is subject to change based on plant changes and I will update by Friday of this week." Plaintiff's name was included on Mr. Seebock's list.

On May 16, 1995, plaintiff attended a staff meeting. In that meeting, Mr. Seebock reminded his managers that "lists of positions" were to be turned in to him that day. Plaintiff thought these lists might be "hit lists" in connection with the reorganization.

Plaintiff asked for a follow-up meeting with Mr. Seebock that same day. In this meeting, plaintiff asked whether his position was on the list of those to be retained. Mr. Seebock did not tell plaintiff that plaintiff's name was included on Mr. Seebock's tentative list. Plaintiff testified as to Mr. Seebock's response as follows: "There was not a direct answer, but something to the effect that he had not had an opportunity to discuss the future of strategic planning with Fred [Musone] and he guessed that, at my age, it would be difficult to train for another position."[3] Plaintiff additionally

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3. Mr. Seebock testified that plaintiff actually made the age-related comment.

testified that "different words . . . may have been used to the effect, 'At your age, it would be difficult to find a new job,' or 'to be trained for a new position,' or 'to do anything else.' It all had the same intent to me. I would defer to my own notes written right after the meeting." Plaintiff's notes record as follows:

> I asked about future with company. Said he [Mr. Seebock] didn't know. I referred to "list of positions" due Friday and asked if I was on list. He didn't answer directly — said he hadn't discussed planning with Fred [Musone]. He said he supposed at my age it would be difficult for me to do anything else — but had heard termination settlements would be "better than average."

Plaintiff states he "reminded Mr. Seebock that [he] had just, in fact, been trained for another job, the position of strategic planning, and that [he] disagreed with his statement." Plaintiff testified regarding Mr. Seebock's reply as follows: "I don't think he really responded directly. It was, well, he would have to talk with Fred [Musone]", or "I'll try and get you an answer." Plaintiff testified he understood this comment to mean: "It was the president's [Mr. Musone's] decision to make a decision regarding whether the position of strategic planning would be retained or not." Plaintiff left the meeting and concluded his future with defendant "didn't sound good." As a result, he proceeded to his office and wrote down "the best recollection [he] had of the meeting." During the eight years plaintiff had been acquainted with Mr. Seebock, this was the only time Mr. Seebock had raised the

issue of age. Mr. Seebock's comment during this meeting constitutes the principal reason for plaintiff's belief that he was terminated because of his age.

On June 2, 1995, plaintiff learned his position would be eliminated, effective June 5, 1995. Plaintiff was nearly 53 years old at that time. Although plaintiff does not know whether Mr. Seebock knew plaintiff's age at the time of his termination, plaintiff asserts no reasonable person could mistake plaintiff for being younger than 40 years old. The reason given for the elimination of plaintiff's job was company-wide restructuring. Plaintiff testified about this as follows:

> I guess I'm really still not clear on that [the purpose of the reorganization] though I can relate what was told to everyone at the time, that there was a phrase used that, "We are going to do work differently." This involved, to some extent, a decentralization of the existing structure. The purpose of all that, as I understand it, was to cut costs.

Also on June 2, 1995, defendant offered plaintiff an enhanced severance package in exchange for a termination agreement between plaintiff and defendant. Plaintiff subsequently rejected defendant's offer. Between June 2 and June 5, 1995, plaintiff made no attempt to investigate available employment positions because he believed all other positions had already been filled.

Concerning who was involved in the decision to eliminate plaintiff's position, Mr. Musone testified he would

have left the responsibility of "dealing with this position to Mr. Seebock's discretion." When asked: "Who decided that strategic planning should go?", Roger Tea, Vice President of Human Resources, testified: "Mr. Seebock — after making his recommendations or examining or revising his organization — provided me with a list of the individuals and the positions that were in his mind needing to be eliminated." When asked whether those slated for termination were considered in terms of credentials, seniority, or loyalty, Mr. Tea testified he "assumed that most of that had . . . taken place with the respective plant manager or vice president; in this case, Seebock." However, Mr. Tea did "reserve the right to review the list from [his] perspective to address those very issues." When asked who was involved in the decision to do away with centralized strategic planning, Mr. Seebock testified that he was involved, as well as Mr. Musone, Mr. Tea, and Joe Houghtalen, Vice President of Manufacturing.

As a result of defendant's reorganization and reduction in force, 324 people were let go. The eliminated positions represented a broad cross section of the company, from production jobs to a Vice President's position, and included several managerial positions in addition to plaintiff's position. In a letter to Mr. Tea, dated July 12, 1995, plaintiff stated he "would like to be considered for either a position in planning, business development or program management."

In 1996, plaintiff brought suit against defendant, alleging claims for discrimination in violation of the Age Discrimination in Employment Act (ADEA) and intentional infliction of emotional distress. The court dismissed the emotional distress claim in an earlier order. Defendant now seeks summary judgment as to plaintiff's ADEA claim.

Appendix B

SUMMARY JUDGMENT STANDARDS

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper only when the pleadings, affidavits, depositions or admissions establish there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. The burden of establishing the nonexistence of a genuine issue of material fact[4] is on the moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This burden has two distinct components: an initial burden of production on the moving party, which burden when satisfied shifts to the nonmoving party, and an ultimate burden of persuasion, which always remains on the moving party. *See* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2727 (2d ed. 1983).

When summary judgment is sought, the movant bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and affidavits, if any, he believes demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court there is an absence of evidence in the record to support the nonmovant's case.[5] *See id.*

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4. Whether a fact is material is determined by looking to relevant substantive law. *See Anderson v. Liberty Lobby*, Inc., 477 U.S. 242 (1986).

5. In his dissent in *Celotex*, Justice Brennan discussed the mechanics for discharging the initial burden of production when

(Cont'd)

"[T]here can be no issue as to any material fact . . . [when] a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324.

(Cont'd)
the moving party seeks summary judgment on the ground the nonmoving party — who will bear the burden of persuasion at trial — has no evidence:

> Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

Celotex, 477 U.S. at 323 (citations omitted).

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> If the defendant in a run-of-the-mill civil case moves for summary judgment . . . based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . . .

Liberty Lobby, 477 U.S. at 252. The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless, and the moving party is entitled to summary judgment as a matter of law. *See id.*

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DISCUSSION

I. *ADEA Analysis*

The ADEA provides:

> It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1) (1985). A plaintiff alleging discrimination by an employer "must establish that age was 'a determining factor' in the employer's challenged decision." *Jones v. Unisys Corp.*, 54 F.3d 624, 630 (10th Cir. 1995) (quoting *EEOC v. Sperry Corp.*, 852 F.2d 503, 507 (10th Cir. 1988)). In so proving, a plaintiff may present either direct or circumstantial evidence. *See Jones*, 54 F.2d at 630; *Ingels v. Thiokol Corp.*, 42 F.3d 616, 620 (10th Cir. 1994).

Evidence of direct discrimination is rare, and plaintiffs more often use circumstantial evidence. In circumstantial evidence cases, the Tenth Circuit "has adopted the burden-shifting format of proof originally set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *Ingels*, 42 F.3d at 621; *see also Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir. 1994) ("ADEA claims are analyzed under the three-step framework outlined in *McDonnell Douglas*"), *cert. denied*, 513 U.S. 1152 (1995).

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In this burden-shifting analysis, plaintiff first generally must establish a prima facie case consisting of the following elements: "(1) he was within the protected age group; (2) he was doing satisfactory work; (3) he was discharged; and (4) his position was filled by a younger person." *Gonzagowski v. Widnall*, 115 F.3d 744, 749 (10th Cir. 1997); *accord Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1502 (10th Cir. 1996); *Ingels*, 42 F.3d at 621. The fourth element, however, is treated somewhat differently in "reduction in force" cases like the one at bar. The Tenth Circuit has explained:

> In reduction in force cases, because a plaintiff is not always replaced with another employee, we modified the McDonnell Douglas burden-shifting scheme so that a plaintiff may demonstrate the fourth element by producing "evidence, circumstantial or direct, from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue."

Jones, 54 F.3d at 630 (quoting *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988)); *accord Ingels*, 42 F.3d at 621. Plaintiff can also establish the fourth element through "circumstantial evidence that [he] was treated less favorably than younger employees." *Jones*, 54 F.3d at 630.

Second, once plaintiff establishes a prima facie case, the burden shifts to defendant to provide evidence of "a facially nondiscriminatory reason for its employment decision." *Corneveaux*, 76 F.3d at 1502-03; *accord Jones*, 54 F.3d at

630.[6] If defendant meets its burden, " 'the presumption of discrimination established by the prima facie showing simply drops out of the picture.' " *Jones*, 54 F.2d at 630 (quoting *Ingels*, 42 F.3d at 621).

Third, assuming defendant produces a legitimate basis for its decision, plaintiff then must demonstrate that "age was a determining factor in the challenged decision by either showing that the defendant's proffered reasons were really a pretext for age discrimination[7] or by producing direct evidence of age discrimination." *Jones*, 54 F.3d at 630; *accord Corneyeaux*, 76 F.3d at 1503. Plaintiff establishes pretext by "showing either 'that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence.' " *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir. 1994)

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6. "The defendant's burden is merely to articulate through some proof a facially nondiscriminatory reason for the termination; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion."

Ingels, 42 F.3d at 621 (quoting *E.E.O.C. v. Flasher Co., Inc.*, 986 F.2d 1312, 1316 (10th Cir. 1992) (footnote omitted)).

7. "Establishing pretext gets a plaintiff over the hurdle of summary judgment against it, but it does not entitle the plaintiff to summary judgment because at trial the jury must be convinced that the pretext concealed a discriminatory motive. That ultimate question resides with the trier of fact." *Ingels*, 42 F.2d at 622 n.3.

(quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). In so doing, plaintiff "need not prove the defendant's reasons were false" or that " 'age was the sole motivating factor in the employment decision.' " *Id.* (quoting *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1170 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985)). Plaintiff, however, "must show that age actually played a role in the defendant's decisionmaking process and had a determinative influence an the outcome." *Id.*; *accord Corneveaux*, 76 F.3d at 1504. After plaintiff is given a " 'full and fair opportunity' " to demonstrate pretext, the court "must determine whether the evidence interpreted in the light most favorable to the plaintiff could persuade a reasonable jury that the employer had discriminated against the plaintiff." *Rea*, 29 F.3d at 1455 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973)). Summary judgment is appropriate when there are no disputed facts concerning pretext. *See id.*

In addressing a summary judgment motion, if the court concludes plaintiff has produced "both a prima facie case and evidence supporting a finding that 'defendant's alleged nondiscriminatory reasons for the employment decisions are pretextual, the case should go to the factfinder.' " *Jones*, 54 F.2d at 630 (quoting *Ingels*, 42 F.3d at 622).

II. *Application*

A. *Direct Evidence*

Defendant argues there is no direct evidence that it intended to discriminate against plaintiff because of his age.

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Plaintiff asserts Mr. Seebock's comment to plaintiff during their meeting on May 16, 1995 and the context in which it was stated constitute direct evidence of defendant's discrimination.

Defendant contends Mr. Seebock's remark did not rise to a level sufficient to constitute direct evidence of age discrimination. " 'Age-related comments referring directly to the worker may support an inference of age discrimination.' " *Cone v. Longmont United Hosp. Assoc.*, 14 F.3d 526, 531 (10th Cir. 1994) (quoting *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025 (6th Cir.), *cert. denied*, 510 U.S. 861 (1993)). However, "[i]solated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions." *Cone*, 14 F.3d at 531; *accord Rea*, 29 F.3d at 1457. To establish this animus, plaintiff "must demonstrate a nexus between the allegedly discriminatory statements and the defendant's decision to terminate [him]." *Rea*, 29 F.3d at 1457; *accord Cone*, 14 F.3d at 531-32. This "causal nexus" is shown "if the allegedly discriminatory comments were directed at the plaintiff, [his] position, or the defendant's policy which resulted in the adverse action taken against the plaintiff." *Rea*, 29 F.3d at 1457; *accord Cone*, 14 F.3d at 532.

In the instant case, it is undisputed that, when plaintiff inquired of Mr. Seebock specifically about the future of plaintiff's position, Mr. Seebock made a statement directly to plaintiff referencing plaintiff's age. However, the court is of the opinion that Mr. Seebock's statement does not supply direct evidence that age was a factor in the elimination of plaintiff's position. In *Tomsic v. State Farm Mut. Auto. Ins.*

Co., 85 F.3d 1472 (10th Cir. 1996), a gender discrimination case, the Tenth Circuit recently addressed the nature of a supervisor's remarks directed to the employee plaintiffs. In *Tomsic*, the supervisor told one plaintiff she "could be expected to lack motivation because her husband earned a substantial income". *Id.* at 1477. The supervisor told the other plaintiff she "could be expected to encounter problems in her marital relationship . . . because her husband would probably become uncomfortable with her earning more than he in future years." *Id.* at 1477-78. Both plaintiffs subsequently were asked to resign. The Tenth Circuit determined that, despite the fact that these comments were made directly to the plaintiffs and the supervisor's recommendations were considered in the company's personnel decisions, "these remarks are insufficient to constitute direct evidence of discriminatory intent in the terminations." *Id.* at 1478. Rather, the supervisor's statements were " 'on their face expressions of . . . personal opinion, and not an existing policy which itself constitutes discrimination' ". *Id.* (quoting *Ramsey v. City and County of Denver*, 907 F.2d 1004, 1008 (10th Cir. 1990)). These remarks, therefore, "constitute circumstantial or indirect evidence, not direct evidence." *Id.* This court is persuaded that, even if Mr. Seebock's tentative list of employees, dated May 15, 1995, were adopted during defendant's reduction in force process, Mr. Seebock's comment to plaintiff merely expresses his opinion about plaintiff's potential difficulties with employment, and, thus, cannot constitute direct evidence of discrimination.[8]

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8. Plaintiff additionally cites for support to *Riffel v. Oklahoma Gas & Elec. Co.*, No. 97-6304 (10th Cir. March 31, 1998) and

(Cont'd)

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Defendant also claims Mr. Seebock's comment cannot be used as direct evidence of discrimination because he did not make the ultimate decision concerning plaintiff's employment. *See, e.g., Cone*, 14 F.3d at 531 ("age-related comments by non-decisionmakers are not material in showing the [defendant's] action was based on age discrimination"); *Jones*, 54 F.3d at 632 (statement of defendant's employee, responsible for job posting, that it is "about time we unloaded some of this old driftwood" was merely "stray remark by someone not in a decision-making position" which did not establish "intent to discriminate"). Plaintiff contends Mr. Seebock, alone, was responsible for the elimination of plaintiff's position. Plaintiff, therefore, argues Mr. Seebock lied to plaintiff on May 16, 1995 by not telling plaintiff his name was on Mr. Seebock's list of May 15, 1995. Although the parties dispute the extent of Mr. Seebock's involvement in the decision to eliminate plaintiff's

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(Cont'd)

Goodwin v. M.C.I. Communications Corp., No. 96-1096 (10th Cir. Feb. 4, 1998). The statements at issue in these cases are distinguishable from the case at bar and reveal that discrimination played a role in the plaintiffs' terminations. In *Riffel*, the plaintiff's supervisor stated: "I'm not going to back that old man." The supervisor also stated: "[I]f it had been anybody else, I would have gone to bat for him. You know how old men are — they aren't going to change." These comments are not statements of mere personal opinion. In *Goodwin*, there was "substantial evidence" of the primary decision maker's "racial animus", including the fact that he was "disgusted" with the relationship between the plaintiff and a white employee. In contrast, in the case at bar, the evidence consists of Mr. Seebock's single comment. In fact, plaintiff concedes Mr. Seebock had never made an age-related comment in the eight years plaintiff had known him, save in this isolated instance.

job, this factual dispute does not change the nature of Mr. Seebock's alleged discriminatory remark to plaintiff. An expression of personal opinion cannot constitute evidence of direct discrimination. *See Tomsic*, 85 F.3d at 1478.

B. *Prima Facie Case of Circumstantial Evidence*

In the absence of direct evidence, the court turns to the burden-shifting analysis for circumstantial evidence. Defendant contends that, even if it concedes plaintiff can show the first three elements, plaintiff cannot establish a prima facie case of circumstantial age discrimination because he fails to offer proof of the required fourth element, i.e., that plaintiff was treated less favorably than younger employees.

Defendant argues there is no evidence that plaintiff was treated less favorably than younger employees. In support of this position, defendant submits the Affidavit of Roger Darrel Tea. Mr. Tea states his assessment of the effects of defendant's reduction in force (RIF) efforts "showed that the workforce before the RIF comprised 24.7 percent workers who were forty years of age or older" while "[t]he percentage of workers forty years of age or older after the RIF was 24.8 percent." Mr. Tea, thus, concludes "there were more age-protected workers after the RIF than before and there was no adverse impact." Affidavit of Roger Darrel Tea, ¶ 4.

Plaintiff does not dispute the slight statistical increase in the proportion of employees over age 40 after defendant's restructuring. Plaintiff, however, claims the record is replete with evidence that plaintiff was treated less favorably than younger employees. The court disagrees.

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It is undisputed that over 300 jobs were lost as a result of defendant's reorganization and reduction in force. The eliminated positions represented a broad cross section of the company, from production jobs to a Vice President's position, and included several managerial positions in addition to plaintiff's position. Plaintiff, nevertheless, argues there is sufficient evidence of age discrimination because younger or less senior workers filled four positions — Manager for European Programs[9], Manager for General Motors, Plant Manager, and Manager for Process Redefinition — for which he states he was qualified. This evidence is not probative as to whether plaintiff's position was eliminated because of his age. Although plaintiff claims he was qualified for these positions, he has not shown he was more qualified than the younger workers designated. Moreover, he has provided no facts supporting an inference that the reduction in force was discriminatory. "The ADEA does not require employers to accord members of the protected class preferential treatment, but only that they treat age neutrally." *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988). Furthermore, "courts are not free to second-guess an employer's business judgment." *Id.*

Plaintiff also submits his own affidavit in which he states he is "familiar with" three employees under age 40 who

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9. Plaintiff claims defendant refused to consider "bumping" the less senior worker holding this position. The Tenth Circuit, however, recognizes that the "refusal to allow plaintiffs to bump less senior employees [is] not in itself evidence of an ADEA violation. If a job is eliminated, the organization has no duty to allow one employee to bump a less senior, and possibly younger employee, from a different position." *Jones*, 54 F.3d at 630 n.6.

retained positions after the reduction in force. Again, this information is not probative as to whether plaintiff's position was eliminated because of his age. Some employees younger than age 40 obviously remained in defendant's employ after the restructuring.

Plaintiff next contends that, because he was "kept in the dark about his job", he was unable to participate in "the process in which younger workers competed and acquired favorable jobs in the restructure." While plaintiff contends he was "kept in the dark", he provides no evidence that younger employees were privy to information, to which he had no access, which gave them an unfair advantage over plaintiff in competing for or acquiring jobs. Moreover, although plaintiff claims he was prevented from securing another position because he was "kept in the dark about his job", it is undisputed that, shortly after Mr. Musone became company president in early 1995, plaintiff heard rumors there would be a reorganization or decentralization. Additionally, by May 16, 1995, plaintiff had concluded his future with defendant "didn't sound good." Nevertheless, plaintiff made no effort to seek another position with defendant.

Finally, plaintiff claims that, because he was "in the dark", he was unable to engage in the "jockeying for position" Mr. Seebock knew was happening. However, the record reveals that, once chosen, the new plant managers began to develop their organizations, selecting from among the general pool of company employees. This evidence neither supports plaintiff's argument that he was not allowed to compete for positions with younger workers nor establishes that plaintiff was treated less favorably than any other employee.

The court, thus, concludes that, with the exception of Mr. Seebock's single, isolated comment, there is no circumstantial evidence " 'from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.' " *Jones*, 54 F.3d at 630 (quoting *Branson*, 853 F.2d at 771). In the court's view, this scintilla of evidence is insufficient to preclude summary judgment as a fair-minded jury could not find for plaintiff on this evidence alone. Accordingly, the court finds plaintiff has failed to meet his burden of establishing a prima facie case of age discrimination.

C. *Pretext*

Because the court has determined that plaintiff has failed to establish a prima facie case of age discrimination, it need not continue the burden-shifting analysis. However, the result would not differ even were the court to consider the next step.

Plaintiff concedes, for purposes of this motion, that defendant's decisions concerning its reorganization and decentralization constitute a facially non-discriminatory basis for the elimination of his position as Manager of Advanced Strategic Planning and Business Development. The burden, therefore, shifts back to plaintiff to demonstrate that his age was a determining factor in defendant's employment decisions. Plaintiff may satisfy this burden by showing either that defendant's purported non-discriminatory reorganization was actually a pretext for age discrimination or by presenting direct evidence of such discrimination. As plaintiff has failed to produce direct evidence of discrimination, the court focuses upon the issue of pretext.

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Plaintiff seeks to establish pretext based upon the same evidence as that presented to establish his prima facie case of discrimination, i.e., Mr. Seebock's remark to plaintiff during their meeting on May 16, 1995 and the context in which it was stated. The court is not persuaded plaintiff has set forth evidence adequate to demonstrate that the issue of age actually had a determinative influence on defendant's restructuring decisions.

First, Mr. Seebock's isolated remark remains the sole evidence of age discrimination against plaintiff. This comment alone does not establish that defendant's company-wide restructuring decisions were motivated by discriminatory reasons.

Second, even considering Mr. Seebock's remark in the particular context in which it was made does not alter the court's view. Plaintiff claims Mr. Seebock, alone, made the decision to eliminate plaintiff's job. Plaintiff, therefore, believes Mr. Seebock lied to him on May 16, 1995 by not telling plaintiff he was on Mr. Seebock's May 15, 1995 list of employees to be terminated. The record belies plaintiff's position. Plaintiff concedes that each time he asked Mr. Seebock about the future of his position, Mr. Seebock replied essentially that it would depend upon Mr. Musone. In fact, plaintiff testified in his deposition that, after his informal meeting with Mr. Seebock on May 16, 1995, he understood that "[i]t was the president's decision to make a decision regarding whether the position of strategic planning would be retained or not." Additional deposition testimony, notably that of Mr. Tea and Mr. Seebock, reveals the decisions for the reduction in force were a team effort, based upon Mr.

Musone's restructuring plan. Finally, even Mr. Seebock's list itself indicates it is "tentative" and "subject to change based on plant changes". Thus, plaintiff has failed to outline specifically for the court how evidence of Mr. Seebock's opinion about plaintiff's age influenced defendant's reduction in force decisions.

The court concludes that, even construing the evidence in the light most favorable to plaintiff, it is insufficient for a reasonable and fair-minded jury to find that defendant discriminated against plaintiff on the basis of age.[10]

CONCLUSION

In sum, the court concludes plaintiff has provided neither direct evidence nor sufficient circumstantial evidence of age discrimination to survive summary judgment. Accordingly, defendant's motion is hereby GRANTED, and plaintiff's case is dismissed.

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10. In *Tomsic v. State Farm Mut. Auto. Ins. Co.*, 85 F.2d 1472 (10th Cir. 1996), the Tenth Circuit found sufficient evidence of a pretext for gender discrimination. In that case, the recommendations of a supervisor without decision-making authority, who had made discriminatory comments to the plaintiffs, were before the decision-maker, and the plaintiffs ultimately were terminated. However, the plaintiffs' supervisor made multiple discriminatory comments to the plaintiffs, made comments to others about the plaintiffs' employment, and gave an inconsistent explanation of his evaluation of one plaintiff's performance. In contrast, in the instant case, Mr. Seebock's single comment to plaintiff is the sole evidence of age discrimination. There is no evidence Mr. Seebock's isolated remark to plaintiff had any effect on defendant's restructuring and reorganization plans.

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DATED this 29th day of April, 1998.

BY THE COURT:

s/ David Sam
DAVID SAM
CHIEF JUDGE
U.S. DISTRICT COURT

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 15, 2000

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-4074

JAMES STONE,

Plaintiff – Appellant,

v.

AUTOLIV ASP., INC., formerly known as Morton International,

Defendant – Appellee.

ORDER

Filed May 15, 2000

Before, **BRORBY, LUCERO,** Circuit Judges, and **WEST***, District Judge.

Appellant's petition for rehearing is denied as untimely and on the merits.

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* Honorable Lee R. West, District Judge of the Western District of Oklahoma, sitting by designation.

Appendix C

Entered for the Court
PATRICK FISHER, Clerk of
Court

by: s/ [illegible]
Deputy Clerk

APPENDIX D — MANAGEMENT POLICY OF MORTON INTERNATIONAL, INC., AUTOMOTIVE SAFETY PRODUCTS GROUP DATED MARCH 20, 1990

MANAGEMENT POLICY

Section: Human Resources
Section#: 600
Doc No.: 600-20-02-1

Sub-Section: 20 Employee Selection
Effect. Date: 03/20/90
Pages: 2

Issue: 3
Supersedes: 600-20-02-1; 07/22/89

Morton International, Inc., Automotive Safety Products Group
Holmgren
Approval: Ken

Subject: EXEMPT EMPLOYEE WORK FORCE REDUCTION

*** Paragraph Revised ** Paragraph Added**

PURPOSE

1 The purpose of this policy statement is to provide guidelines for dealing with reduction in the exempt employee work force, should such reduction become necessary.

Appendix D

POLICY

2 If a permanent reduction in the exempt work force is required, it is the intent of the company to retain the employees with the most experience and skill for the available work and to retain an appropriate distribution of job classifications within the overall salary structure.

GUIDELINES

3 All decisions and actions under this policy will be in accordance with the company's Equal Employment Opportunity Policy and the current year's Affirmative Action Plan.

4 Employee selection for layoff will be based on the following:

a. The organization unit being reduced.

b. Job classifications being reduced within the organizational unit.

c. Relative skills and abilities of the job

classification incumbents within the organizational unit.

5 Where the skills, abilities, and value to the Division are equal among the employees being considered for layoff, the employees with the greatest continuous service will be retained.

6 Employees surplused by their organizational unit will be considered for approved open requisitions existing within other organizational units.

6.1 These positions do not have to be identical to the classification held by the employee.

6.2 To be considered for available positions, the employee's performance rating at the most recent review must be "meets expectations" or better.

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7 Employees scheduled for layoff will be given as much advance notice as possible, but not less than four weeks or the minimum required by law. In lieu of four weeks notice, pay will be given for that portion of the four weeks that the employee is not on the payroll. Any exceptions to this will require the approval of the Vice President, Human Resources and the President.

8 For a period of two years, laid off employees shall be given consideration for rehire to jobs for which they are qualified prior to someone being hired not previously employed by the company.

9 If the rehire is accomplished within a period of time equal to the employee's length of prior continuous service (maximum of two years), prior service will be connected. For pension plan purposes, employees will be

considered in a layoff status and will earn vesting and benefit service for a period of up to one year. If rehire is accomplished after this period, pension service will be determined in accordance with the provisions of the plan.

DEFINITIONS

10 N/A

RESPONSIBILITY

11 The President will initiate or approve an exempt employee work force reduction.

12 Human Resources is responsible for implementing the guidelines of this policy when a work force reduction has been approved.

12.1 Human Resources and management of the organizational unit in which an existing opening is to be filled by an employee surplused by another organizational unit will determine the employee's qualifications

and the appropriate pay rate for the new classification.

RELEVANT DIVISION 13 TBD
PROCEDURES

OTHER REFERENCES 14 N/A

To Be Reviewed By:
Dave Dahle, Pat Elliott, Steve Hoisington, Joe Houghtalen, George Kirchoff, Chuck Seebock, Roger Tea

Approved:
Dave Dahle, Pat Elliott, Steve Hoisington, Joe Houghtalen, George Kirchoff, Chuck Seebock, Roger Tea

Status: VP APPROVED

APPENDIX E — EXCERPTS OF TESTIMONY

Q. Fair enough. As you were making these changes did you have an opportunity to discuss with Mr. Seebock or Mr. Kirchoff or anyone else what the future of this position that Mr. Stone held would be, the manager of strategic planning?

A. I don't recall any specific discussions such as that. I do recall in the government's board continually trying to tell the people to make sure that they stayed away from personalities and focussed on function and once you had your functions then you needed to look at your complete available personnel group to fill those openings.

* * *

Q. Did you have any discussions with Mr. Seebock or anyone else about terminating that position that you can recall?

A. Here again, I didn't really want to have very many specific discussions because I really wanted these people to tell us what they needed to run the business. If I was going to have specific discussions then somebody is redundant in this activity and I really didn't want to do that. Usually in a business the people and the pieces of the business that are contributing are very visible and very well known and you don't have to debate whether it is or whether it isn't. People are saying I have to have this. Let me tell me what it does and so on. It's pretty self promoting the value added pieces of an enterprise.

Q. Would you have simply left the division of dealing with this position to Mr. Seebock's discretion?

A. Absolutely.

* * *